

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548

Boyle

19987

FILE: B-204937

DATE: November 9, 1981

MATTER OF: Data Dynamics, Inc.

DIGEST:

1. Protest--against procuring agency determination to permit new firm (composed of former key employees of protester) to compete against protester (incumbent contractor)--is dismissed because competition is in accord with Government procurement policy, and GAO is not the proper forum to resolve the protester's dispute with the new firm.
2. Contention--that the RFP provided insufficient time for the protester to prepare a proposal--involves an alleged impropriety apparent from the solicitation. Since it was not protested prior to the closing date for receipt of initial proposals, this aspect of the protest is untimely under 4 C.F.R. § 21.2(b)(1) (1981) and will not be considered on the merits.
3. Basis of protest--that competitor had advance knowledge of RFP's requirements--first presented to GAO more than 10 working days after it was known or should have been known by protester is untimely under 4 C.F.R. § 21.2(b)(2) (1981) and will not be considered on the merits.

Data Dynamics, Inc. (DDI), protests any award under request for proposals (RFP) No. F04690-82-R-0009 issued by the Air Force for certain software support services at the Air Force Satellite Control Facility. The Air Force restricted competition under the RFP to DDI, the incumbent contractor, and Applied Technology Associates, Inc. (ATA).

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DDI essentially contends that a fair competition with ATA is not possible because (1) ATA knows the rates that DDI pays its personnel and ATA would propose the same personnel that DDI would propose, (2) ATA had knowledge of the Air Force's expanded requirements prior to release of the RFP, and (3) DDI did not have enough time to prepare a proposal.

DDI explains that the Air Force elected not to exercise the option for the final year in DDI's current contract for the subject services; instead, the Air Force considered placing a contract for the required services with ATA through the Small Business Administration's (SBA) "8(a)" program. DDI states that it convinced the Air Force that the "8(a)" award to ATA would not be in the best interests of the Government. Subsequently, the Air Force issued this RFP permitting ATA and DDI to compete for the award.

In its initial submission, DDI indicates that competition with ATA is not possible because ATA is controlled by a former key employee of DDI, who has secured for ATA the services of other former DDI employees. In that regard, on September 24, 1981, DDI filed suit in the Superior Court in Santa Clara County, California, against ATA, alleging unfair competition, interference with advantageous relationships, breach of trust, fraud, breach of contract, and conspiracy.

In its initial letter of protest to our Office, DDI requests that we review (1) the Air Force's actions in issuing the RFP permitting ATA and DDI to compete and (2) the propriety of ATA's actions and representations to the Air Force. In a letter dated October 28, 1981, DDI argues that a fair competition is not possible because ATA knows the rates that DDI pays its personnel and ATA would propose the same personnel that DDI would propose. In that letter, DDI also argued that DDI did not have enough time to prepare a proposal before the closing date for receipt of initial proposals on October 2, 1981. DDI further argued that ATA had knowledge of the Air Force's expanded requirements prior to release of the RFP. DDI explains that near the end of August, 1 week prior to release of the RFP, DDI's former key employee

announced to DDI that he would no longer be supporting DDI full time. In addition, in July, DDI learned that the Air Force was considering making an "8(a)" award to ATA.

First, as DDI admits, the Air Force has permitted DDI to compete against ATA in lieu of making an "8(a)" award to ATA. This action by the Air Force appears to be favorable to DDI and in accord with the basic requirement that procurements be made on a competitive basis. Defense Acquisition Regulation § 1-300.1 (1976 ed.). Moreover, while ATA may know the rates that DDI pays its present personnel, ATA could only speculate who DDI might have proposed and what DDI might have proposed paying them. Further, we note that the RFP provided that cost was the least important evaluation factor and the technical and management aspects of an offeror's proposal were more important factors. Consequently, the Air Force's action permitting ATA and DDI to compete does not present a meritorious basis for DDI's protest. See Don-Ko Water Treatment Company, B-203067, May 28, 1981, 81-1 CPD 419.

Second, whether ATA acted properly in employing DDI's former key people is a matter pending before a State court. Further, the resolution of DDI's dispute with ATA is not an appropriate matter for consideration under our bid protest function. Ted R. Brown & Associates, Inc., B-201724, February 23, 1981, 81-1 CPD 127.

Third, DDI's contention--that there was insufficient time to prepare a proposal--involves an alleged impropriety apparent from the RFP. Under 4 C.F.R. § 21.2(b)(1) (1981), to be timely, such matters must be protested prior to the closing date for receipt of initial proposals. Since DDI did not timely raise this basis of protest, we will not consider it on the merits. F.E.E. Industries, Inc., B-201807, August 25, 1981, 81-2 CPD 174.

Fourth, DDI's contention--that ATA had advance knowledge of the Air Force's expanded requirements--is based on information known to DDI at the time that DDI received the RFP. Under 4 C.F.R. § 21.2(b)(2) (1981), to be timely, such matters must be protested within 10 working days after the basis of protest was or should have been known. Since, DDI first raised

this issue more than 10 working days after receipt of the RFP, this aspect of DDI's protest is untimely and will not be considered on the merits. Skyways, Inc., B-201541, June 2, 1981, 81-1 CPD 439.

Accordingly, since DDI's submissions indicate that the timely portion of the protest is not cognizable under our bid protest function, we will not request a report from the Air Force and DDI's protest is dismissed.

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For Harry R. Van Cleve
Acting General Counsel